Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-862

J. EVERETT ANDERSON,

Petitioner,

v.

MAX J. NEUBERGER AND THE BOARD OF ELECTIONS OF SUFFOLK COUNTY, N. Y., ET AL.,

Respondents.

CHARLES E. MORRIS,

Petitioner,

v.

ALBERT T. HAYDUK AND THE BOARD OF ELECTIONS OF WESTCHESTER COUNTY, N. Y., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION BY RESPONDENT BOARD OF ELECTIONS OF SUFFOLK COUNTY, NEW YORK

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Statute:

New York State Election Law § 6-132	*passim*

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Question Presented

The petitioner misstates the issue sought to be reviewed. The issue is whether the Election Law § 6-132, subd. 2, as construed by the court of appeals of the State of New York

to require that the assembly district of each subscribing witness be indicated at the foot of each page of the nominating petition signed by the qualified voters of the political party, operates as a restriction which is so severe as itself to constitute an unconstitutionally onerous burden on the exercise of the first amendment rights of the petitioner who unsuccessfully sought access on the regular party primary ballot.

Statement of the Case

The co-petitioner, J. Everett Anderson, was denied access on the ballot for the democratic party primary election held on September 12, 1978 for the public office of representative to the United States Congress from the second congressional district. The Supreme Court of the State of New York (County of Suffolk) ruled that the designating petition on Mr. Anderson's behalf was invalid because the subscribing witness failed to show his assembly district as required by the election law § 6-132, subd. 2 (1a-4a). The appellate division, second judicial department affirmed the lower court for the same reason (5a, 6a). Leave to appeal to the court of appeals was denied on August 30, 1978 (7a).

The co-petitioner, Charles E. Morris, was denied access to the ballot for the conservative party primary election held on September 12, 1978 for the public office of assemblyman to the New York Assembly from the 93rd assembly district. The Supreme Court of the State of New York (County of Westchester) ruled that the designating petition on behalf of Mr. Morris was valid notwithstanding that it did not include the assembly district of the subscribing witness. That court based its conclusion on the premise that the New York Legislature in its recent legislative overhaul of the election law made the indication of assembly district a non-mandatory requirement (15a, 16a). The appellate division, second judicial department unanimously

reversed the lower court (18a, 19a). The court of appeals of the State of New York, in a memorandum, affirmed the appellate division on the ground that the recent legislative overhaul to the election law did not affect or amend the relevant statutory language which was previously construed to require a subscribing witness to the designating petition in all areas of the state to list his current assembly district (20a, 21a).

In both proceedings, the holding of *In the Matter of Rutter* v. *Coveney,* 38 N.Y.2d 993, 348 N.E.2d 913, 384 N.Y.S.2d 437 and related cases (See: *Matter of Clune* v. *Hayduk,* 34 N.Y.2d 965, 318 N.E.2d 600, 360 N.Y.S.2d 408; *Matter of Gordon* v. *Catania,* 34 N.Y.2d 964, 318 N.E.2d 600, 360 N.Y.S.2d 408; *Matter of Sciarra* v. *Donnelly,* 34 N.Y.2d 970, 318 N.E.2d 600, 360 N.Y.S.2d 410), was invoked to render invalid the designating petitions.

In *Rutter,* the court of appeals of the State of New York construed the election law § 6-132, subd. 2, to require subscribing witnesses to designating petitions to indicate their current assembly district. The court held that the omission or erroneous indication of the assembly district rendered any designating petition invalid.

Contrary to petitioner's opinion (See: petition at 8), the court, in *Rutter, judicially construed* The Election Law § 6-132, subd. 2, *to require* subscribing witnesses to indicate their election districts. That same court in the proceedings at bar held that the recent legislative overhaul to the election law did not obviate the *Rutter* construction. Thus, the petitioners do indeed challenge the constitutionality of the election law as construed by the court of appeals in *Rutter,* and the proceedings at bar. The court's construction of the statute therefore must be read in tandem with the election law. See: *O'Brien* v. *Skinner,* 414 U.S. at 531, 532.

No substantial federal question is presented by the appeal.

The petitioners believe that the two orders of the New York State Court of Appeals should be vacated and the matters remanded for reconsideration in light of *Storer* v. *Brown,* 415 U.S. 724. The Board of Elections of Suffolk County, New York submits that the federal question presented is insubstantial for two reasons: First, in *Storer,* this court was concerned with a state's election law claimed to confer monopolistic status upon the regular party by excluding the names of independent parties and their candidates from appearing on the election ballot, there being no compelling state interest worthy of protection. In the proceedings at bar, the petitioners were not independent candidates. They were instead persons who sought a ballot line in a regular party primary election. The petitioners do not claim that the New York State election law discriminates against them or confers monopolistic status on a particular political organization or persons. For this reason, the federal question presented is insubstantial.

Second, the rationale invoked by the lower courts to set aside the designating petitions was based upon the holding of *In the Matter of Rutter* v. *Coveney,* 38 N.Y.2d 993, 348 N.E.2d 913, 384 N.Y.S.2d 437, where the New York State court of appeals stated that:

> "[T]he requirements of subdivision 3 of § 135 of the election law are designed to facilitate the discovery of irregularities or fraud in designating petitions. This purpose *may only be achieved* by mandating *uniform and strict* compliance with the statutory requirements (citation of cases omitted). To make exceptions, county by county, although seemingly justified in a particular instance, sanctions a practice which in another circumstance could lead to abuses. (Citation of case omitted)." (Emphasis added.)

The compelling interest of a state in insuring the integrity of its political process from frivolous or fraudulent candidates was recognized in *Bullock* v. *Carter,* 405 U.S. 134, 146 and *Jenness* v. *Fortson,* 403 U.S. 431, 442. Accordingly, the identification of the assembly district by the subscribing witness to the designating petition passes constitutional muster and presents an insubstantial federal question to be reviewed by this court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: Hauppauge, New York
December 28, 1978

Respectfully submitted,

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